

FILED  
IN THE UNITED STATES DISTRICT COURT MISSOULA, MT

FOR THE DISTRICT OF MONTANA 2006 SEP 21 AM 9 13

MISSOULA DIVISION

PATRICK E. JEFFY

BY \_\_\_\_\_

DEPUTY CLERK

ADRIENNE UPSHAW,

Cause No. CV-05-204-M-JCL

Plaintiff,

vs.

FINDINGS AND RECOMMENDATION OF  
UNITED STATES MAGISTRATE JUDGE

MISSOULA COUNTY REGIONAL JAIL,  
CAPTAIN ON DUTY,  
OFFICER BOE,

Defendants.

Currently pending before the Court is Plaintiff's Civil Rights Complaint (Document 1). Plaintiff alleges she was discriminated against, subjected to cruel and unusual punishment, neglected, denied her rights, and had her mental and physical health jeopardized as a result of being denied toilet paper for approximately a day and a half while incarcerated in the Missoula County Detention Facility. She is seeking \$300,000 for pain and mental anguish.

**I. Preliminary Screening of the Allegations of the Complaint**

Pursuant to the federal statute governing proceedings in forma pauperis, federal courts must engage in a preliminary screening of cases to assess the merits of the claims. 28 U.S.C. § 1915(e)(2); 28 U.S.C. § 1915A; see also Franklin v. Murphy, 745 F.2d 1221, 1226-27 (9th Cir. 1984). The court must identify

cognizable claims, or dismiss the complaint, or any portion of the complaint, if the complaint is frivolous, malicious, or fails to state a claim upon which relief can be granted, or if the complaint seeks monetary relief from a defendant who is immune from such relief. Id.

## **II. Parties**

Plaintiff Adrienne Upshaw is incarcerated at the Montana Women's Prison in Billings, Montana. She was incarcerated at the Missoula County Detention Facility at the time the events alleged in her complaint occurred.

The named Defendants are the Missoula County Regional Jail, the Captain on duty at the Missoula County Regional Jail in September 2003 and Officer Boe from the Missoula County Regional Jail.

## **III. Plaintiff's Allegations**

Plaintiff alleges that in September 2003 she was incarcerated in solitary confinement in the Missoula County Regional Jail. As she was cleaning her cell she misplaced her toilet paper. Apparently, the rule at the jail was that you need the cardboard roll in order to obtain more toilet paper. When the officer came around Ms. Upshaw did not have her cardboard roll. The next day she asked for some toilet paper from Officer Bo and another officer. Officer Bo laughed and told her to use her towel. While some other inmates provided her with some

toilet paper, that paper ran out and she had to use her towel all night and the next morning. When she explained the situation to another officer the next day, she had to pick up the towel without gloves in order to obtain some more toilet paper.

#### **IV. Analysis**

"[O]nly the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment under the Eighth Amendment." Whitley v. Albers, 475 U.S. 312, 319, 106 S.Ct. 1078, 89 L.Ed.2d 251 (1986) (internal quotation marks omitted); see also Farmer v. Brennan, 511 U.S. 825, 832, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994) (concluding that a sufficiently serious deprivation must result in the denial of "the minimal civilized measure of life's necessities" such as shelter, sanitation, food, personal safety, medical care, and clothing) (quoting Rhodes v. Chapman, 452 U.S. 337, 347, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981)).

Although the conditions of Upshaw's confinement may have been uncomfortable and somewhat unsanitary, those conditions did not violate the Eighth Amendment's prohibition against cruel and unusual punishment. See Harris v. Fleming, 839 F.2d 1232, 1234-36 (7th Cir. 1988) (finding no Eighth Amendment violation when prison officials failed to provide a prisoner with toilet paper for five days, and soap, a toothbrush, and toothpaste for ten days). The Court acknowledges that some courts have considered

hygiene items such as toothpaste, soap and toilet paper to be "minimal necessities of civilized life." See, e.g. Carver v. Bunch, 946 F.2d 451, 452 (6th Cir. 1991); Chandler v. Baird, 926 F.2d 1057, 1065 (11th Cir. 1991) (same). However, the denial of toilet paper for a little more than a day, without more, simply does not rise to the level of an Eighth Amendment violation.

Moreover, there is no allegation that Plaintiff suffered any physical harm as a result of the denial of toilet paper. The Prison Litigation Reform Act provides that "[n]o Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). "[F]or all claims to which it applies, 42 U.S.C. § 1997e(e) requires a prior showing of physical injury that need not be significant but must be more than de minimis." Oliver v. Keller, 289 F.3d 623, 627 (9th Cir. 2002).

Therefore, it is this Court's finding that Plaintiff's Complaint is frivolous and fails to state a claim upon which relief can be granted.

Based on the foregoing, the Court enters the following:

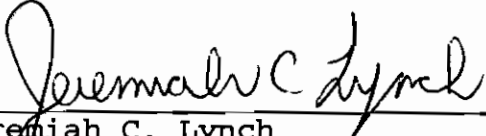
**RECOMMENDATION**

1. Plaintiff's Complaint (Document 1) should be **DISMISSED WITH PREJUDICE**.

2. The Court should direct the Clerk of Court to make the docket reflect that this dismissal counts as a strike pursuant to 42 U.S.C. § 1915g on the grounds that the Complaint was frivolous and failed to state a claim upon which relief could be granted.

3. Plaintiff shall notify the Court immediately if her address changes. Failure to do so may be cause for dismissal of this case without further notice.

DATED this 20th day of September, 2006.

  
Jeremiah C. Lynch  
United States Magistrate